# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. III, NO. 4 SEPTEMBER 2005

## REFORMULATION OF CRIMINAL JUSTICE ACT PANEL

Steps taken to reformulate and reduce of the size of the Criminal Justice Act Panel here in the district were recently completed. The judges approved a final listing that includes 45 attorneys for Clarksburg; 14 attorneys for Elkins; 27 attorneys for Wheeling; and 21 attorneys for Martinsburg.

These efforts resulted in a CJA Panel that is about 50% smaller than the old listing, and it includes those attorneys who are both experienced and show a genuine interest in federal criminal defense. The reduced panel size will better allow for compliance with that section of the Local CJA Plan requiring panel members receive "an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide high quality of representation."

All CJA Panel appointments will continue to be made on a rotational basis from the recently approved listing unless the Court requests a particular appointment. Attorney contacts are regularly documented on personal information sheets. Please call the Federal Defender Office at (304) 622-3823 to request a copy of the new CJA Panel Attorney listing, to review attorney contact information sheets or if you have any questions or concerns.

## THIRD-LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY WITHOUT GOVERNMENT MOTION

Since the Feeney Amendment took effect in April 2003, a district judge could not grant a third-level adjustment for acceptance of responsibility unless it first receives "a motion of the government." U.S.S.G. §3E1.1(b). Both the guideline and applicable commentary hinge this third-level reduction on a "timely" guilty plea that permits the government "to avoid preparing for trial." In practice, however, federal prosecutors will not motion for this third-level adjustment unless a defendant executes a written plea agreement. These plea agreements contain many provisions advantageous to the government that have little or nothing to do with avoiding trial preparation. Plea agreement provisions include a cooperation clause, relevant conduct stipulations and appeal and habeas waivers that relate to the sentence imposed.

Now, a recent unpublished Fourth Circuit opinion provides support for the third-level adjustment for acceptance of responsibility *even absent a government motion.* In United States v. Catala, 2005 WL 1395163, 6/14/05, the Court found the government's motion no longer essential in a post-Booker proceeding: "[W]e no longer construe §3E1.3(b) to require a government motion before a district court can award a third-level adjustment." A district court can make an independent determination based on whether a defendant has sufficiently

assisted "by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial . . ."

In those cases where a defendant decides to plead guilty to the indictment, without the benefit of a written plea agreement, the Catala opinion is very useful if the record supports a timely plea that allowed the government to avoid trial preparation.

**INCLUSION OF SUGGESTED DATES IN CONTINUANCE MOTIONS**

At a recent meeting, the judges decided that the local rules would be changed to include a requirement that all motions for a continuance include three suggested dates and times that are mutually acceptable to the parties. The moving party should confer with opposing counsel, agree on three new dates and provide this information in the body of the motion. This practice will reduce the need for court staff to contact parties once the continuance motion is filed. Until the local rule change takes effect, CJA Panel Attorneys are asked to initiate and maintain this practice.

**USE OF INTERPRETERS FOR CASE RELATED ATTORNEY-CLIENT MEETINGS**

At certain points of holding court in the district there has been an increased need for interpreters who can assist in translating at attorney-client meetings. Due to a large influx in the Hispanic population in the Martinsburg area, there is a constant need for Spanish speaking interpreters there. These interpreters qualify as "experts" under the Criminal Justice Act and panel attorneys can request authorization for the expenditure of funds on the CJA-21 form. If the cost of the interpreter will exceed $500, there must be *prior* court approval.

Panel attorneys should be aware of the difference between court certified interpreters and those without such certification. Certified interpreters pass vigorous examinations and are authorized to translate court proceedings. As such, the hourly rate charged by certified interpreters is between $175-$200. Interpreters without such certification are still fluent in their respective language and extremely useful, but charge far less.

Two such providers in the Martinsburg area include Trans Lingual LLC at (304) 274-5889. The charge is $50 per hour. Also, Patricia Aragon is a part-time teacher who will work as a Spanish speaking interpreter. Ms. Aragon charges $40 per hour and may be reached at (304) 754-4702.

Call the Federal Public Defender at (304) 622-3823 for assistance in locating interpreters for the other areas in the district. Also, references from panel attorneys who had luck with a particular interpreter are greatly appreciated.

**POST-BOOKER APPEAL PIPELINE CASES**

The Fourth Circuit Court of Appeals continues to grapple with direct appeals that raise unpreserved claims under Booker. In those instances where the district judge committed a Sixth Amendment error by imposing a sentence exceeding the maximum allowed based on only jury found facts or facts admitted at the guilty plea, the

Court will assume prejudice under plain error review. United States v. Hughes, 401 F.3d 540 (4th Cir. 2005). This type of error does not exist if the actual sentence imposed falls within or below the guideline sentence applicable without the judge-found facts. United States v. Evans, 416 F.3d 298 (4th Cir. 2005).

If the only error alleged is a sentence imposed under the then-mandatory guideline scheme (a non-constitutional error), the defendant bears the burden to show prejudice, i.e. a lower sentence would have been imposed the district had such authority. United States v. White, 405 F.3d 208 (4th Cir. 2005).

In United States v. Blick, 408 F.3d 162 (4th Cir. 2005), the Court upheld the sentencing appeal waiver provision found in a written plea agreement, and found that Booker had no effect on the manner in which such waiver provisions are interpreted.

**BOP REFERENCE BOOK**

An excellent resource book describing the Federal Bureau of Prisons' day-to-day activities was written by Mary Bosworth and is entitled The U.S. Federal Prison System. Each chapter addresses a different area such as: Classifications and Security; Discipline; Substance Abuse Programs; Education; Food and Commissary; Medical Service; Sexual Relations and Violence; Staff; Religion; Work; and Visits, etc. In addition, the book provides detailed write-ups on each federal prison facility. Many include a "Prisoner Comment" section with candid descriptions of what to expect at that facility.

The only criticism is the need for a pocket part describing the newer federal prison facilities that have gone on-line since the book was first published, i.e. FCI Gilmer and USP Hazelton. And look forward to another federal prison in McDowell County, West Virginia sometime in the next few years.

Copies of The U.S. Federal Prison System are available at the Federal Defender Offices in Clarksburg, Wheeling and Martinsburg.

**FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES**

United States v. Taylor, 414 F.3d 528 (4th Cir. 2005).

- Court finds no due process or equal protection right to appointment of counsel for Rule 35 sentence reduction proceeding.

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005).

- Court provides detailed findings required before government may use FRE Rule 804(b)(6) hearsay against a "party that has engaged or acquiesced in wrongdoing" that procured the unavailability of the declarant.

United States v. Cheek, 415 F.3d 349 (4th Cir. 2005).

- Court uses prior conviction exception of Apprendi to find that defendant's Sixth Amendment rights were not violated through enhancement of criminal sentence on the basis of three previous convictions that were not alleged in the indictment or admitted by the defendant during his plea hearing.

United States v. Collins, 415 F.3d 304 (4th Cir. 2005).

- Court criticized governments's closing argument as impermissible vouching where prosecutor stated: "The government is always seeking to determine whether [the witnesses] are telling the truth, and we do not take lightly the fact that we have an agreement . . . with each one of those witnesses where they are supposed to tell the truth."

- District court erred by failing to instruct that, for purposes of setting a specific threshold of drug quantity under §841(b), the jury must determine the amount of cocaine base attributable to the defendant using Pinkerton principles, i.e. considering only the drug activity by others that was both within the scope of the agreement and reasonably foreseeable.

- When a prior conviction is used to increase the criminal history, burden falls on defendant to show there was an underlying constitutional defect that raises an inference of the invalidity of the prior conviction, i.e. conviction achieved in violation of Sixth Amendment right to counsel.

Yi v. Federal Bureau of Prisons, 412 F.3d 526 (4th Cir. 2005).

- Court upholds BOP's interpretation of good time credit statute, 18 U.S.C. §3624(b), to require the calculation of credits based on the inmate's actual time served, and not the sentence imposed. (This results in a formula whereby no federal inmate will ever receive more than 47-days good time credit per year, rather than the 54-days good time credit referred to by Congress in the statute).

In Re: Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005).

- Appellants (corporate employees) had no attorney-client relationship with corporate attorneys' internal investigation as there was no evidence investigating attorneys told appellants that they represented them, and there was no evidence appellants ever sought legal advice from investigating attorneys.

United States v. Johnson, 410 F.3d 137 (4th Cir. 2005).

- Where defendant found sitting unresponsive in his car while blocking traffic, police were performing community-care taking function during warrantless search of glove compartment, therefore, motion to suppress evidence denied.

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005).

- Court disallows two-level increase for abuse of position of trust under §3B1.3 where defendant fraudulently asserted he possessed state and federal certification as a bomb-sniffing canine team handler to receive government contracts.

- Arms-length commercial relationship where trust is created by defendant's personality or by the victim's credulity cannot justify the §3B1.3 enhancement.